

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 28, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2016AP161
STATE OF WISCONSIN**

Cir. Ct. No. 2015SC1701

**IN COURT OF APPEALS
DISTRICT IV**

JOHN J. MILLER,

PLAINTIFF-APPELLANT,

V.

CITY OF LA CROSSE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for La Crosse County:
GLORIA L. DOYLE, Judge. *Affirmed.*

¶1 KLOPPENBURG, P.J.¹ John Miller appeals the circuit court order dismissing his small claims complaint. As explained below, Miller fails to make any meritorious argument on appeal. I therefore affirm the circuit court's order.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

BACKGROUND

¶2 Miller filed a small claims complaint against the City of La Crosse seeking monetary damages because he was denied a taxi operator's license. Miller attached to the complaint a brief statement of dates and facts; his application for a public vehicle driver license; and the letter denying his application, which stated the reasons for denial as (1) probation/parole status, (2) current charges pending, and (3) past conviction record. The complaint included a return date of November 13, 2015.

¶3 On November 9, 2015, the City filed its answer and affirmative defenses, including: (1) the City is immune from liability action; (2) Miller failed to comply with the written notice requirements; and (3) the complaint fails to state a claim on which relief can be granted.

¶4 On the return date of November 13, 2015, the parties appeared in circuit court. The circuit court set the matter for a court trial to commence on December 21, 2015. Miller requested a six-person jury trial. On November 17, 2015, the court issued a notice of hearing for jury selection on January 11, 2016 with the jury trial scheduled to commence on January 13, 2016. Miller objected to the rescheduling. The court explained in a letter to Miller that it rescheduled because the first date was for a court trial and he had requested a jury trial.

¶5 On December 10, 2015, the City filed a motion to dismiss on the grounds that: (1) the City is immune from liability action; (2) Miller failed to comply with the written notice requirements; (3) the complaint fails to state a claim on which relief can be granted; and (4) Miller's allegations are properly addressed through certiorari review, not a claim for damages. Miller responded with an untitled document in which he asked for a motion for default judgment

and asserted that the case cannot be dismissed pursuant to WIS. STAT. § 799.22. On December 16, 2015, the circuit court dismissed the case with prejudice stating that the “plaintiff has no cause of action and fails to state a claim for which relief can be granted.”

¶6 Miller filed a motion to reconsider and a statement saying that he “want[s] to appeal this dismissed case to the court of appeals ... what happens to the money I paid for the jury of \$36.” The circuit court ordered the refund of the jury fees to Miller.

DISCUSSION

¶7 On appeal, Miller does not challenge the grounds the circuit court stated for dismissal, but instead appears only to challenge the process that led up to the dismissal.

¶8 Miller states his four challenges to the process leading up to the dismissal in a cursory manner, without any developed legal argument. While the appellate court makes some allowances for parties who, like Miller, appear pro se, “[w]e cannot serve as both advocate and judge,” and will not scour the record to develop arguments for an appellant. *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992); *State v. Jackson*, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999). In addition, Miller did not file a reply brief refuting the City’s arguments as to why Miller’s four challenges have no merit (and as to why the circuit court properly dismissed his complaint), and, therefore, he is deemed to have conceded those arguments. *See Fischer v. Wisconsin Patients Comp. Fund*, 2002 WI App 192, ¶1 n.1, 256 Wis. 2d 848, 650 N.W.2d 75 (“An argument asserted by a respondent on appeal and not disputed by the appellant in the reply

brief is taken as admitted.”). Nevertheless, I will briefly address Miller’s arguments as best as I can discern them.

¶9 Miller’s first argument is that he had a right to the jury trial that he requested under WIS. STAT. § 799.21(3) (“Any party may ... file a written demand for trial by jury.”). Miller’s third argument is that he had a right to present his arguments and proofs and witnesses under WIS. STAT. § 799.209(1) (“At any trial, hearing or other proceeding under this chapter: (1) The court or circuit court commissioner shall conduct the proceeding informally, allowing each party to present arguments and proofs and to examine witnesses to the extent reasonably required for full and true disclosure of the facts.”).

¶10 I understand these two arguments to be that the circuit court improperly dismissed Miller’s complaint before he was able to present his case at trial. However, the statutory provisions on which Miller relies apply where a case proceeds to trial, and Miller points to no language in these or other statutes, or in any case law, that requires a circuit court to proceed with trial when the complaint fails to state a claim on which relief can be granted. To the contrary, a motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint, accepting the facts alleged and all reasonable inferences from them as true. *Casteel v. McCaughtry*, 176 Wis. 2d 571, 578, 500 N.W.2d 277 (1993). In other words, even if all the facts stated in a complaint are true, the court properly dismisses the complaint when under the law there is no condition under which the plaintiff can recover. *Id.* In that situation, there are no factual disputes to be tried, because even resolving those disputes in the plaintiff’s favor without trial, the plaintiff is not entitled to any remedy under the law. Accordingly, Miller had no right to present his case at trial because the circuit court found that his complaint fails to state a claim on which relief can be granted as a matter of law.

¶11 Miller’s second argument is that the City was entitled to move to dismiss only if Miller failed to appear at the return date under WIS. STAT. § 799.22(1) (“If the plaintiff fails to appear on the return date ... the court may enter a judgment for the defendant dismissing the action, on motion of the defendant or on its own motion.”). However, while this statute authorizes a motion to dismiss when the plaintiff fails to appear, no language in the statute prohibits a defendant from moving to dismiss on other grounds. WISCONSIN STAT. § 799.04 states: “Except as otherwise provided in this chapter, the general rules of practice and procedure in chs. ... 801 to 847 shall apply to actions and proceedings under this chapter.” The City moved to dismiss under WIS. STAT. § 802.06(2). Accordingly, the City’s motion was properly before the circuit court.

¶12 Miller’s fourth argument is that he was entitled to a default judgment against the City because the City failed to timely file and serve a written answer. Miller relies on the circuit court’s notice of hearing dated November 13, 2015, which set this matter for a court trial and included a paragraph requiring the “defendant(s) to file a written Answer ... on or before 12/7/15.” Miller subsequently moved for default judgment because the City failed to answer by that date. However, as stated above, the City did answer the complaint on November 9, 2015, and both parties appeared in court on the return date of November 13, 2015. Because the City timely filed the answer and both parties appeared on the return date, Miller was not entitled to a default judgment against the City.

CONCLUSION

¶13 For the reasons stated, I affirm the circuit court’s order dismissing Miller’s complaint.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)4.

